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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 849. 29

ELMIRA NICHOLS AND PAULINE THOMPSON,
APPELLANTS,
v.
COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

BRIEF FOR THE APPELLEE, THE COMMONWEALTH OF MASSACHUSETTS.

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THE CASE.

The appellants appealed from the judgment of the Superior Court of the Commonwealth of Massachusetts for Worcester County, May 23, 1938, which was affirmed by the decision of the Supreme Judicial Court of the Commonwealth on December 21, 1938, overruling the appellants' exceptions which operated to make said judgment a final judgment (R. pp. 1-3). Their appeal to this court was allowed on March 2, 1939 (R. p. 3).

The appellants were originally arraigned before the Central District Court of Worcester for Criminal Business, charged with violation of the Revised Ordinances of the City of Worcester, chapter 36, section 12. This chapter is headed "Streets" and relates to the care of the public

ways, streets and sidewalks in the City of Worcester (R. 6-7). Section 12 reads:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets."

The appellants moved to dismiss on the grounds that the ordinance is contrary to the Constitution of the United States, Fourteenth Amendment, and void on its face (R. 7).

The trial justice denied the motion, found the appellants guilty and imposed a fine of five dollars ($5.00) on each, from which judgment the appellants appealed to the Superior Court for Worcester County (R. 7).

In the Superior Court the appellants duly moved to quash and dismiss on the ground that the complaint did not allege a crime, that the ordinance was void and unconstitutional on its face and that the ordinance violated the freedom of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The trial justice of the Superior Court denied the motion to quash and dismiss. To this ruling the appellants duly excepted. After trial upon the evidence the justice found the appellants guilty (R. 7), the appellants having waived their right to a trial by jury (R. 11, 15). A stay of execution was granted (R. 16). The appellants prosecuted their exceptions in the Supreme Judicial Court of the Commonwealth, where, after hearing, they were overruled (R. 20), and an opinion thereon was rendered (R. 21-25), reported in Massachusetts Advance Sheets (1938) p. 1969; 18 N.E. (2d) 166.

The Constitutional Provisions Involved.

The appellants invoke the following provisions of the Constitution:

Amendments.

Art. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Art. XIV. Sec. 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Argument.

1. The ordinance in question is a valid regulation under the police power for the preservation of public order, and the prevention, by misuse, through littering, of the public ways, and its specific provisions do not offend against the constitutional guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

The ordinance in question does not fall within the prohibition of the rule laid down by this court in *Lovell* v. *City of Griffin*, 303 U.S. 444, and applied in *Hague* v. *Committee for Industrial Organization*, 59 Sup. Ct. 954.

A. The phraseology of the instant ordinance of the City of Worcester as a whole shows that its intent was limited to the prevention of the accumulation of litter and rubbish

in the streets and that its practical operation would not extend its scope beyond such legitimate purpose.

The ordinance only forbids persons to "distribute." The interpretation of the quoted word by the Supreme Judicial Court of Massachusetts limits its meaning to the gratuitous giving away of the enumerated objects and does not embrace within its scope any *sale* thereof and accordingly does not forbid the sale of newspapers and other printed matter in the street (R. 22).

A comparison of the Massachusetts ordinance and that of Georgia, considered in *Lovell* v. *City of Griffin, supra,* 303 U.S. 444, makes clear the difference between the two.

The Massachusetts ordinance reads:

> "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets."

The Georgia ordinance reads:

> "Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> "Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

It is apparent that the Massachusetts ordinance, unlike the Georgia ordinance, read as a whole, appears to relate to and to have as its purpose, as has already been said, the prevention of accumulation of litter and rubbish in the streets and the preservation of the comfort and safety of travelers therein. It does not by any of its terms establish any system of censorship as does the Georgia ordinance. Thus it is free from the chief element of the evil against which the first amendment to the Constitution was aimed, from which persons are to be protected, an amendment which the court has said is of vital importance to protect the essential liberty of the press.

> *Near* v. *Minnesota*, 283 U.S. 697, 713-716.
> *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245-246.

A similar comparison of the Massachusetts ordinance and that of New Jersey, considered in *Hague* v. *Committee for Industrial Organization, supra*, 59 Sup. Ct. 954, reveals the difference between the two.

The New Jersey ordinance reads:

> "No person shall distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet."

It prescribes severe penalties for its breach.

This ordinance applies not only to the gratuitous distribution of all printed matter, but to the sale thereof, bringing within its purview all newspapers, periodicals and pamphlets. Furthermore, this prohibition is not limited to streets and ways, but extends to all public places. It was interpreted by the court as an absolute prohibition of distribution (Op. p. 965). It was, moreover, linked to other

ordinances forbidding the holding of parades and public assemblies, all of which together clearly indicated a purpose to curb the privilege of free press and lawful assembly.

B. The Massachusetts ordinance is not unrestricted in its application with respect to time or place. It is limited to streets and ways where the giving out of printed papers may well be regarded as inconsistent with the maintenance of public order and clean and unlittered streets. It does not, as did the Georgia ordinance prohibit generally distribution of literature of any kind, at any time and any place and in any manner within the city limits without the requisite permit from the city manager acting virtually as a censor. Nor does it, as did the New Jersey ordinance, contain an absolute prohibition against distribution of all kinds of literature in all public places.

C. By the interpretation given to the word "distribution" in the Massachusetts ordinance by the highest court of the Commonwealth the ordinance does not forbid the sale of newspapers or other printed matter even in the streets, as did those of Georgia and New Jersey, and this is of importance as tending to show the intention of the makers of the ordinance to pass only a measure fully within the police power, namely, for the preservation of the public welfare by provision for clean and unlittered streets. It is obvious from the usual mode of human behavior that persons are more likely to retain in their possession and not to throw away onto streets at the first opportunity an object for which they have paid money as distinguished from an object which has been given to or thrust upon them gratuitously. The Massachusetts ordinance involves no censorship, no interference with the publication or distribution of anything in the City of Worcester except that

for reason immediately affecting the public welfare there must not be gratuitous distribution in the public streets. The ordinance merely withdraws the public streets and ways from places available for free distribution, leaving open for distribution all the rest of the city.

The construction placed upon the ordinance by the Supreme Judicial Court of Massachusetts relative to the sweep of the word "distribution" will be adopted as determining the meaning of that word as used in the instant ordinance.

J. Bacon & Sons v. *Martin*, 59 Sup. Ct. 257.
Olsen v. *Smith*, 195 U.S. 332, 343.
W. W. Cargill Co. v. *Minnesota*, 180 U.S. 452, 466.
Anglo-American Provision Co. v. *Davis Provision Co.*, 191 U.S. 373, 374.
Soper v. *Lawrence Bros.*, 201 U.S. 359, 370.
Orr v. *Allen*, 248 U.S. 35, 36.

2. THE SCOPE OF THE MASSACHUSETTS ORDINANCE IS OF SUCH A LIMITED CHARACTER THAT IT DOES NOT TO A MATERIAL EXTENT INTERFERE WITH THE LIBERTY OF THE PRESS EITHER IN PRODUCTION OR CIRCULATION.

The scope of the Massachusetts ordinance is so limited that it does not even in the matter of distribution affect the guaranties of the liberty of the press so as to render it unconstitutional.

In maintaining these guaranties, the power of the State, and inferentially of its subdivisions, to enact laws in the exercise of the police power to promote the health, safety, morals and general welfare of its people is not swept away, though such authority must be exercised with appropriate regard to the particular subject-matter to which it is directed, and it must stop short of material interference with such guaranties.

The historic concept of the liberty of the press as to its freedom from censorship and arbitrary restrictions upon the character of its expressions has been set forth by this court in

Near v. *Minnesota, supra,* 283 U.S. 697.
Grosjean v. *American Press Co., supra,* 297 U.S. 233.
De Jonge v. *Oregon,* 299 U.S. 353.
Ex parte Jackson, 96 U.S. 727.

Such concepts of the liberty of the press are not, it is submitted, invaded by a regulation of the character of the Massachusetts ordinance. The ordinance in question does not in intent or effect create a total restriction on the free dissemination of literature and opinion, nor any general arbitrary or unreasonal' restriction on the distribution or sale of such literature and opinion. It merely prevents its dissemination in one particular manner, which manner, as has been pointed out in the opinion of the Supreme Judicial Court of Massachusetts (R. 7), may affect adversely the public welfare through the interference with travelers in the public way.

As was said by the Supreme Judicial Court of Massachusetts (R. 22):

> "Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired."

Gitlow v. *New York,* 268 U.S. 652, 666-667.
Whitney v. *California,* 274 U.S. 357, 371.
Stromberg v. *California,* 283 U.S. 359, 368.

Similar ordinances to that of Massachusetts providing for a reasonable regulation of the use of streets, which affects only incidentally one method of distributing printed matter, have been upheld as constitutional.

Commonwealth v. *Kimball*, 1938 Mass. Adv. Sh. 267; 13 N.E. (2d) 18.
In re Anderson, 69 Neb. 686.
Milwaukee v. *Kassen*, 203 Wis. 383.
Cf. *Davis* v. *Massachusetts*, 167 U.S. 43, affirming *Commonwealth* v. *Davis*, 162 Mass. 510.

It is submitted that the Massachusetts ordinance falls squarely within that class of ordinances which this court in its opinion in *Lovell* v. *City of Griffin*, *supra*, 303 U.S. 444, inferentially indicated might be sustained because in no way open to the following objection found in the Georgia ordinance, of which the court said:

> "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, . . . or the misuse or littering of streets."

The Massachusetts ordinance is plainly limited to ways which this court would seem to have had in mind in employing the quoted phrase.

Respectfully submitted,

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